IN THE SUPREME COURT OF THE
STATE OF MISSOURI

JOEL C. BIANCO, et al., Respondents, v. MERAMEC VALLEY BANK, Appellant.	No. SC 84046

ON APPEAL FROM THE JUDGMENT OF THE
CIRCUIT COURT OF ST. LOUIS COUNTY
TWENTY-FIRST CIRCUIT
THE HONORABLE JAMES R. HARTENBACH,
AND TRANSFER FROM THE
COURT OF APPEALS FOR THE EASTERN DISTRICT

APPELLANT'S REPLY BRIEF

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MAI 23.05

ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING MERAMEC'S TWO (2) MOTIONS FOR DIRECTED VERDICT, MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL AND ENTERING JUDGMENT AGAINST MERAMEC ON THE CLAIM OF FRAUDULENT MISREPRESENTATION, BECAUSE MISSOURI LAW AND COURT RULES CLEARLY STATE THAT BIANCO'S CLAIM AROSE FROM THE SAME TRANSACTION OR OCCURRENCE AS THOSE PLED IN A PRIOR REPLEVIN PROCEEDING (INITIATED BY MERAMEC AGAINST BIANCO) DEPRIVING THE TRIAL COURT OF SUBJECT MATTER JURISDICTION OVER THE CLAIMS IN THE INSTANT CASE. THE FACTS UNDERLYING BIANCO'S CLAIM OF FRAUDULENT MISREPRESENTATION IN THE INSTANT CASE (NAMELY, ALLEGED REPRESENTATIONS IN CONNECTION WITH MERAMEC'S REPLEVIN OF BIANCO'S PERSONALTY) OCCURRED IMMEDIATELY AFTER MERAMEC FILED A REPLEVIN ACTION AGAINST BIANCO, THUS, REQUIRING BIANCO TO ASSERT THE CLAIM AS A COMPULSORY COUNTERCLAIM IN THE PRIOR REPLEVIN PROCEEDING PURSUANT TO RULE 55.32 OF

THE MISSOURI RULES OF CIVIL PROCEDURE. THE TRIAL COURT'S ACTIONS CONSTITUTED REVERSIBLE ERROR, AND THE JUDGMENT SHOULD BE VACATED OR REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.

The concepts of compulsory counterclaim, *res judicata*, collateral estoppel, and the like are related and often confused even by the most skilled practitioner. (Substitute Brief, p.38). However, even the novice recalls from the first year of law school the necessity of bringing all of a client's related claims before the court and the perils of failing to do so. See Wright & Miller, Federal Practice and Procedure § 1417, p.139 (1990) ("Thus, the careful attorney can and usually will plead all of his client's claims as counterclaims if there is any reason to believe that they might be considered compulsory.").

Bianco eagerly acknowledges the similarities between the Compulsory Counterclaim Rule (Mo.R.Civ.P. 55.32(a)) and *res judicata* but fails to acknowledge their subtleties and differences. (Bianco Brief, pp. 53). *Res judicata*, collateral estoppel, splitting a cause of action, abatement, and the Compulsory Counterclaim Rule are all related doctrines, but they are as different as siblings in a family. A lay person could reasonably lump double jeopardy into the brood, but no attorney (like no parent) would confuse one with another. They are all related, but each is distinct. The case Bianco relies on (*66, Inc.*, discussed *infra*) is good

law as it relates to *res judicata*, a judicially created doctrine that, at a minimum, requires "four identities" to be invoked. However, those Bianco seeks to overrule (*Rell, Evergreen, Choate*) are equally good law as they relate to the Compulsory Counterclaim Rule, a court rule codified by statute that must be strictly construed. § 509.420 RSMo; Mo.R.Civ.P.55.32(a). The differences between these distinct legal concepts undermines Bianco's argument forming the, albeit simple, but flawed logic that follows. In other words, because A does not equal B, Bianco's illustrative syllogism and its argument fail. (Bianco Brief, p.53)

As explained (and acknowledged by Bianco) the Compulsory Counterclaim Rule is a codification of *res judicata* principles. (Substitute Brief, p.79; Bianco Brief, p.53); *Beasley v. Mironuck*, 877 S.W.2d 653, 656 (Mo.App.E.D. 1994). Collateral estoppel and splitting a cause of action similarly implicate those principles, but it would be erroneous to use the terms interchangeably. See *Beasley, Id.* (Substitute Brief, p.79; Bianco Brief, p. 66 n.28 quoting *Elam v. City of St. Ann*, 784 S.W.2d 330, 333 (Mo.App.E.D. 1990)("neither identical nor mutually exclusive**"**). Doing so hardly provides the foundation to justify overruling numerous cases from the Eastern, Western and Southern Districts.

Under the Rules, it was Bianco's Absolute Obligation to Raise All Compulsory Counterclaims in the Replevin Case.

The scope of the Compulsory Counterclaim Rule (Mo.R.Civ.P. 55.32(a)) must be construed broadly. See *Myers v. Clayco State Bank,* 687 S.W.2d 256, 261 (Mo.App.S.D. 1985). Bianco asserts its claims in the instant case were not compulsory counterclaims in the Replevin Case, because they are "not related to any claim concerning the SBA Note or the Ski Nautique Note, the subject matter of the Replevin Case . . ." (Bianco Brief, p.78). Both arose out of the same operative facts. *Stevinson v. Diffenbaugh Industries, Inc.*, 870 S.W.2d 851, 856 (Mo.App.W.D. 1993). Each of the facts underlying the claims in the instant case arose from Meramec's rights and remedies under the notes and security agreements set forth in the Replevin Case. (LF 8-17;90-342-248). See *Meramec,* 14 S.W.3d at 686; *Myers,* 687 S.W.2d at 261. Bianco's claims in the instant case were compulsory counterclaims in the Replevin Case.

In defining the scope of the Compulsory Counterclaim Rule, Bianco rejects the factual and procedural similarities between *Myers* and the instant case, and instead urges this Court to recognize an unpublished Tennessee lower court case, *Lowe v. First City Bank of Rutherford County*, 1994 WL 570082, *3 (Tenn.Ct.App. 1994). *Lowe* held an abuse of legal process claim was not a compulsory counterclaim to a prior promissory note action. (Bianco Brief, p.78).

Bianco argues *Lowe* cannot be distinguished. Meramec respectfully disagrees, in that, Bianco did not raise abuse of process in the instant case. Moreover, Tennessee's compulsory counterclaim rule differs from Rule 55.32 by explicitly excluding tort claims. See Tenn.R.Civ.P. Rule 13.01.

To illustrate, *Oak Ridge Precision v. First Tennessee Bank,* 835 S.W.2d 25-30 (Tenn.App. 1992), affirmed the circuit court's decision that a borrower's contract claims against a lender were compulsory counterclaims in the lender's prior Chancery Court action on a note. The borrower also alleged various torts, including fraudulent misrepresentation and intentional interference, but the compulsory counterclaim rule adopted in Tennessee specifically excludes tort actions. See *Quelette v. Whittemore,* 627 S.W.2d 681, 682 (Tenn.App. 1981), citing Tenn.R.Civ.P. 13.01. Thus, the court did not bar borrower's fraud and interference claims under the compulsory counterclaim rule but specifically noted that much of borrower's complaint was an attempt to "recast its contractual counter-claim in language of tort." *Oak Ridge,* 835 S.W.2d at 30. *Lowe* relies on a different rule that directly altered the result and is completely inapposite to the instant case.

Bianco further rejects the fundamental premise that Rule 55.32(a) required it to raise all compulsory counterclaims in the Replevin Case. See *State ex rel Davis v. Moss,* 392 S.W.2d 260, 262-264 (Mo. 1965); *State ex rel Fawkes v. Bland,* 210

S.W.2d 31 (Mo.App.W.D. 1948). Bianco contends there was "no opportunity for [it] to raise the fraud claim as a compulsory counterclaim in the Replevin Case." (Bianco Brief, p.70) This is the single most egregious fallacy in this entire case!

Bianco knew the Replevin Case was pending on or about October 6, 1997. *Meramec Valley Bank v. Joel Bianco Kawasaki Plus, Inc, et al.*, 14 S.W.3d 684, 686, 689 (Mo.App.E.D. 2000). Bianco knew what the petition averred after counsel pulled the court file on or about November 17, 1997. *Id.* Whether the return of service was in the file was irrelevant. (Bianco Brief, p.70) *Moss,* 392 S.W.2d at 263 ("Whether the second suit is filed before or after service of defendant in the first suit filed and whether service is obtained earlier in the first or second suit is immaterial."). The Replevin Case was pending, and Bianco was required to file its compulsory counterclaims in that proceeding. Despite the Rule's simplicity and the plethora of case law interpreting it, Bianco chose to file the instant case two weeks later. *Id*; *Moss,* 392 S.W.2d at 262-264; see *Rell v. Burlington Northern Railroad Company,* 976 S.W.2d 518 (Mo.App.E.D. 1998); *Evergreen National Corp. v. Killian Construction Company,* 876 S.W.2d 633 (Mo.App.W.D. 1994); *Choate v. Hicks,* 983 S.W.2d 611 (Mo.App.S.D. 1999).

Although Failure to Raise a Compulsory Counterclaim is Not an Affirmative Defense, Meramec Pled it Anyway Thereby Extinguishing Bianco's Waiver Argument.

Bianco fails to cite one case holding that its failure to assert a compulsory counterclaim had to be raised by the Bank as an affirmative defense.[1] Moreover,

[1] Bianco suggests *Stevinson v. Deffenbaugh Industries*, 870 S.W.2d 851 (Mo.App.W.D. 1993) "indirectly" acknowledged that a compulsory counterclaim must be raised an affirmative defense. (Bianco Brief, p.50). *Stevinson* never addressed the issue but, if anything, demonstrates that Meramec did not waive the issue. The appellant complained that a nuisance action was a compulsory counterclaim in a prior defamation action, and admitting evidence of damages occurring before the defamation action was improper. *Id.* at 856. The court pointed out that appellant raised the issue in its affirmative defenses, motion to dismiss, motion in limine, withdrawal instruction and in a motion for new trial and judgment notwithstanding the verdict. 870 S.W.2d at 858. It held that compulsory counterclaim was a legal issue, not an evidentiary one. *Id.* Thus, continued objections to the damages evidence was unnecessary; appellant's spray-and-pray approach adequately preserved the issue for review. *Id.* It held the nuisance was a compulsory counterclaim, and prior damages evidence must be excluded on remand.

Bianco fails to distinguish Rule 55.08 (Affirmative Defenses) which does not list it. Furthermore, Bianco fails to analytically refute the Eastern District's reasoning in *Rell*, which expressly held that failure to raise a compulsory counterclaim is not an affirmative defense. *Rell*, 976 S.W.2d at 520.

Although Meramec was not required to affirmatively raise Bianco's failure to assert its compulsory counterclaims in the Replevin Case, Meramec did so anyway. Meramec raised the Compulsory Counterclaim Rule as an affirmative defense in its Amended Answer filed the same day as Bianco's Motion to Amend Petition. (LF 36, 46). In fact or in law, Meramec did not waive the compulsory counterclaim issue.

Meramec Asserted the Compulsory Counterclaim Issue, Depriving the Court of Subject Matter Jurisdiction.

Subject Matter Jurisdiction Cannot Be Waived.

Bianco does not dispute Meramec raised the compulsory counterclaim issue before trial, during trial and in its post-trial motions. Bianco instead mistakenly asserts Meramec "never raised this issue as one of subject matter jurisdiction in the trial court." (Bianco Brief, p. 50). Actually, Meramec did assert that, "Because the fraud claim was a compulsory counterclaim to the Bank's replevin action, the court lacked subject matter jurisdiction over the fraud claim." (LF 131) Regardless, no

magic words are necessary for a court to dismiss for lack of subject matter jurisdiction. Mo.R.Civ.P. 55.32 (g)(3).

"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Mo.R.Civ.P. 55.32 (g)(3). Anyone can raise the issue in any manner. A court can even dismiss *sua sponte*. *Chromalloy American Corp. v. Elyria Foundry Co.,* 955 S.W.2d 1, 3 (Mo. 1997); Mo.R.Civ.P. 84.13(a). "The issue of subject matter jurisdiction **cannot be waived** and can be raised at any stage of the proceedings." *Rell,* 976 S.W.2d at 520 (emphasis added), citing *Williams v. Williams,* 932 S.W.2d 904, 905 (Mo.App. 1996); Mo.R.Civ.P. 55.27(g)(3), 84.13(a). Thus, Meramec could not and did not waive this issue.

Missouri Law Warrants Judicial Notice of the Replevin Case.

Despite discussing it at length in its Statement of Facts, Bianco would like this Court to wear blinders with respect to the Replevin Case. (Bianco Brief, pp.9-11).[2] However, a court is not restricted to the pleadings in considering a motion to

[2] Bianco's Statement of Facts fails to comply with the Rules. It is neither fair nor without argument (Bianco Brief, pp.9-11) and contains matters wholly outside the record. Mo.R.Civ.P. 84.04(c).

dismiss for lack of jurisdiction. *Rell,* 976 S.W.2d at 520. (Substitute Brief, p.36) Thus, it is proper for this Court to take judicial notice of the Replevin Case.

Among other things, it is part of the record. At Bianco's request, the Trial Court took judicial notice of the Replevin Case (Tr.Vol.I p.41,ln.10-16; Tr.Vol.VII p.778,ln.7-12), and in its Response to Meramec's Motion to Dismiss, Bianco attached a copy of the Replevin Case petition (with exhibits). (LF 61-79) In determining subject matter jurisdiction, this Court has a duty to examine all relevant and available evidence and is not limited to what the Trial Court considered below or what the parties now put before it. *Chromalloy,* 955 S.W.2d at 3; Mo.R.Civ.P. 84.13(a). Thus, when considering subject matter jurisdiction, this Court can and should consider all of the pleadings filed in the Replevin Case.

Bianco Attempts To Hand Courts What Has Traditionally Been Beyond Their Reach.

To prevail, Bianco asks this Court to overrule decisions of the Eastern, Western and Southern Districts holding that failure to assert a compulsory counterclaim deprives a subsequent court of subject matter jurisdiction over those claims. *Rell,* 976 S.W.2d 518; *Evergreen,* 876 S.W.2d 633; *Choate,* 983 S.W.2d 611; *Jewish Hospital of St. Louis v. Gaertner,* 655 SW.2d 638 (Mo.App.E.D. 1983) (Bianco Brief, p.73). Astonishingly, Bianco fails to cite one case refuting their reasoning. Without discussion, Bianco chides the courts in *Rell, Evergreen*

and *Choate* for their "bad law, incorrectly decided without analysis of any depth." (Bianco Brief, p.50). Bianco then concludes that *Rell, Evergreen* and *Choate* were "overruled *sub silentio* by the unanimous decision of this Court" in *66, Inc. v. Crestwood Commons Redevelopment Corporation*, 998 S.W.2d 32 (Mo. 1999).[3] (Bianco Brief, p.50) *Sub silentio* is an understatement as *66, Inc.* never mentions compulsory counterclaim, Rule 55.32, subject matter jurisdiction or any of these cases anywhere in its opinion.

66, Inc. is Inapposite to *Rell, Evergreen, Choate* and *Jewish Hospital.*

66, Inc. is wholly distinguishable from these cases as well as the instant case.

- *66, Inc.* never mentions the Compulsory Counterclaim Rule[4]; it discusses *res judicata*;

[3] Meramec listed six (6) additional cases from these districts, including *Jewish Hospital*, that must be revisited to carve out Bianco's desired result. (Substitute Brief, p.74)

[4] The principle cases relied upon by *66, Inc., Green v. City of St. Louis,* 870 S.W.2d 794 (Mo. 1994), *Heins Implement Co. v. Missouri Highway and Transportation Commission*, 859 S.W.2d 681 (Mo. 1993) and *King General*

- *Res judicata* is listed as an affirmative defense that can be waived (Mo.R.Civ.P.55.08, 55.27(g));
- Failure to raise a compulsory counterclaim (*Rell*) and lack of subject matter jurisdiction (Mo.R.Civ.P.55.27(g)(3); 84.13(a)) are not affirmative defenses;
- *Res judicata* is functionally distinguishable ("four identities") from the Compulsory Counterclaim Rule;
- The Compulsory Counterclaim Rule could not have been applied under the facts of *66, Inc.* (same party brought both actions).

Despite this, Bianco concludes that *66, Inc.* -- which never mentions subject matter jurisdiction or failure to raise a compulsory counterclaim -- overrules cases of the Eastern, Western and Southern Districts holding otherwise. See *Rell; Evergreen; Choate; Jewish Hospital, supra.*

Furthermore, Bianco incorrectly asserts that *Rell, Evergreen* and *Choate* are in conflict with *State ex rel. Industrial Properties, Inc. v. Weinstein,* 306 S.W.2d 634 (Mo.App.E.D. 1957) "and the cases upon which it relies,"[5] *Black v. Sanders,*

Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints, 821 S.W.2d 495 (Mo. 1991) never discussed the Compulsory Counterclaim Rule either.

[5] *Weinstein* could not rely on any of these cases, as *Weinstein* was decided before them.

414 S.W.2d 241 (Mo. 1967); *Oates v. Safeco Ins. Co. of America,* 583 S.W.2d 713 (Mo. 1979); and *Fine v. Waldman Mercantile,* 412 S.W.2d 549 (Mo.App.E.D. 1967). (Bianco Brief, p.51) Unlike *66, Inc.*, these cases mention compulsory counterclaim, but none provide a basis for overruling any others.

Bianco's Jurisdictional Gumbo Fails To Establish Subject Matter Jurisdiction.

- Bianco knew the Replevin Case was pending in October 1997;
- Under *Rell, Evergreen* and *Jewish Hospital* (all reported by that time), the failure to assert a compulsory counterclaim deprived a subsequent court of subject matter jurisdiction;
- In November 1997, Bianco reviewed the court file in the Replevin Case;
- In December 1997, Bianco filed this lawsuit when the claims should have been raised as compulsory counterclaims in the Replevin Case;
- Meramec raised the compulsory counterclaim issue three months before trial in its Amended Answer and Motion to Dismiss as well as in its post-trial motions.

Industrial Properties Does Not Conflict With *Rell, Evergreen* and *Choate*.

Attempting to divert this Court's attention from these facts, Bianco quotes sections from *State ex rel. Industrial Properties v. Weinstein* discussing "prior jurisdiction." (Bianco Brief, pp.57-60). However, *Industrial Properties* states at

the outset that is "well-settled" that "prior jurisdiction" applies where multiple public bodies file suit over the same territory, for example, by annexation. 306 S.W.2d at 637. Under this jurisdictional theory, the first to accomplish the annexation "has a superior claim regardless of which one completes its proceedings first." *Id.* at 637. It is unclear from *Industrial Properties* or Bianco's brief that "prior jurisdiction" applies in a non-governmental context. Moreover, the court and Bianco acknowledge the concept did not apply in that case. (Bianco Brief, p.60).

Bianco then switches tack urging that general principles of abatement found in *Industrial Properties* apply. (Bianco Brief, p. 60). Meramec agrees the general principles of abatement are more applicable to the instant case but states that abatement, like *res judicata*, is a distinct doctrine that is not interchangeable with the Compulsory Counterclaim Rule. Following *Industrial Properties*, this Court has explained the interplay between abatement and the Compulsory Counterclaim Rule. However, even where these doctrines meet, it is clear that Bianco's failure to raise its compulsory counterclaims in the Replevin Case deprived a subsequent court of subject matter jurisdiction to hear them again.

"Abatement, also known as the 'pending action doctrine,' holds that where a claim involves the same subject matter and parties as a previously-filed action so that the same facts and issues are presented, resolution should occur through the

prior action and the second suit should be dismissed." *Bellon Wrecking & Salvage Company v. David Orf, Inc.*, 983 S.W.2d 541 (Mo.App.E.D. 1998), quoting *Estate of Holtmeyer v. Piontek*, 913 S.W.2d 352, 357 (Mo.App.E.D. 1996); *State ex rel J.E. Dunn, Jr. & Associates v. Schoenlaub*, 668 S.W.2d 72, 74-75 (Mo. 1984). "The court in which the claim is first filed acquires **exclusive jurisdiction** over the matter." *Id*.(emphasis added); *J.E. Dunn*, 668 S.W.2d at 74; *Fawkes*, 210 S.W.2d 31. Although abatement generally does not apply where the parties' alignment (as plaintiff or defendant) in the first suit is reversed in the subsequent action, it is "manifestly appropriate" if the second cause of action is essentially identical to the first action filed. *J.E. Dunn*, 668 S.W.2d at 75 (holding abatement not applicable because not identical claims; Compulsory Counterclaim Rule barred subsequent suit).

> When a court of competent jurisdiction becomes possessed of a cause, its authority continues, subject only to the authority of a superior court, until the matter is finally and completely resolved; and no court of concurrent jurisdiction may interfere with its action. *Younghaus v. Lakey*, 559 S.W.2d 30,31 (Mo.App.W.D. 1977). **The first court to obtain jurisdiction over a cause retains exclusive jurisdiction of the case until**

> **the case is ultimately resolved**. . . . Generally, a judgment entered without jurisdiction is void. *Ringeisen v. Insulation Services, Inc.*, 539 S.W.2d 621, 626 (Mo.App.E.D. 1976). If a judgment is void, an appellate court acquires jurisdiction only to determine the invalidity of the judgment and to dismiss the appeal. *Settles v. Settles*, 913 S.W.2d 101, 103 (Mo.App.S.D. 1995).

Bellon, 983 S.W.2d 541 (emphasis added).

In *State ex rel. Davis v. Moss*, this Court examined a court's exclusive jurisdiction over claims as it relates to the Compulsory Counterclaim Rule (then Civil Rule 55.45(a), V.A.M.R. (1965)). 392 S.W.2d 260. As previously explained by Meramec (and unaddressed by Bianco), "A party can no longer avoid the impact of the compulsory counterclaim rule by bringing an independent action in another court after the commencement of the original action but before such party files his responsive pleading." *Moss*, 392 S.W.2d at 262, following *State ex rel. Buchanan v. Jensen*, 379 S.W.2d 529, 531 (Mo. 1963). Anything less "does violence" to the Rule inviting litigants to undermine it and cause disruption in the legal process. *Id.* at 263.

Moss is dispositive of the issues in this case. See *J.E. Dunn, supra; State ex rel. Kincannon v. Schoenlaub,* 521 S.W.2d 391 (Mo. banc 1975). When Meramec filed the Replevin Case, the Trial Court obtained exclusive jurisdiction over the subject matter. *Moss,* 392 S.W.2d at 262, 264; *Kincannon,* 521 S.W.2d 391. It was then mandatory for Bianco to raise all compulsory counterclaims therein. *Williams v. Kaestener,* 332 S.W.2d 21, 32 (Mo.App.E.D. 1960); *Fawkes,* 210 S.W.2d at 33. No other court could exercise jurisdiction over Bianco's counterclaims lest they be deemed void. *Younghaus,* 559 S.W.2d at 31; *Ringeisen,* 539 S.W.2d at 626. The risk of the "vanishing verdict" underlies the Compulsory Counterclaim Rule.

Black And *Landers* Are Inapposite. They Involve Written Stipulations Reserving Specific Claims, A Well-Recognized Exception To The Compulsory Counterclaim Rule.

Bianco erroneously hypothesizes that because some courts have described the failure to raise a compulsory counterclaim as a "waiver" of an unasserted claim,[6] then "the ability of the opposing party to assert the waiver is a personal

[6] Compare with *Green v. City of St. Louis,* 870 S.W.2d 794, 797 (Mo. banc 1994) citing *Heins Implement Company v. Missouri Highway & Trans. Comm.,* 859 S.W.2d 681, 684 n.2 (Mo. banc 1993) explaining that in the context of affirmative

right and not a question of the inherent power of the court." (Bianco Brief, p.67). Bianco relies on *Landers v. Smith* and *Black v. Sanders* (likely because their facts were distinguished in *Rell*). However, in both of these cases, the refusal to apply the Compulsory Counterclaim Rule was solely a result of a settlement and dismissal pursuant to a **written stipulation** expressly reserving certain claims. *Landers v. Smith*, 379 S.W.2d 884, 888 (Mo.App. 1964)("Certainly there is no indication that Landers 'deliberately waived his counterclaim'; his stipulation speaks to the contrary."); *Black*, 414 S.W.2d at 244-245, citing *Pierson v. Allen*, 409 S.W.2d 127, 129-130 (Mo. 1966)(claims reserved under written stipulations not later barred); *Zipper v. Health Midwest*, 978 S.W.2d 398, 410-411 (Mo.App.W.D. 1998).

There was no written stipulation between Meramec and Bianco. Moreover, because the Replevin Case is **still pending** Bianco has not yet waived its unasserted compulsory counterclaims. *Landers*, 379 S.W.2d at 888 (counterclaim not foreclosed until prior action reaches judgment). Bianco may file them in the Replevin Case tomorrow. Mo.R.Civ.P 55.32 (a); 55.32(e); 55.33(a). Bianco's reliance on *Black* and *Landers* is inappropriate.

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defenses like *res judicata*, "Rule 55.08 does not contain language indicating waiver; issues not pleaded simply are not raised in the lawsuit."

Oates Does Not Conflict with *Rell, Evergreen, Choate.*

Oates v. Safeco does not advance Bianco's quest to overrule *Rell, et al* either. Note from the outset that *Oates* addressed the Compulsory Counterclaim separately from *res judicata*[7] and collateral estoppel (which it discussed together). 583 S.W.2d at 717-719. Second, this decision highlighted the conflicts of interest inherent between an insurer and its insured in the area of uninsured motorist coverage. *Id.* at 719. This Court held an insured's failure to bring a claim (a counterclaim) against an uninsured motorist was not a "substantive limitation" on the underlying tort action (unlike the insured's failure to file within the statute of limitations) that would bar an insured's recovery against the insurer under the policy. *Id.* at 716-718; explaining *Crenshaw v. Great Central Insurance Co.,* 527 S.W.2d 1,4 (Mo.App. 1975)(statute of limitation for claim against motorist was substantive limitation barring insured's action against insurer under policy).

In this complicated case, the insured failed to file a negligence counterclaim in a pending action defended by the insurer against the motorist. *Id.* at 715. Later noting the inherent conflict of interest between the insured and the insurer, the Court held the failure to file a counterclaim against the motorist was only a "procedural limitation" on the underlying tort action against the motorist. Thus,

[7] "*Res judicata* does not apply here because these are not the same parties or the same cause of action." *Oates,* 583 S.W.2d at 719.

the insured could proceed against the insurer under the policy. *Id.* at 718. Nothing suggests the term "procedural" applies broadly to any other context. Even the *Crenshaw* rule (defining "substantive limitation") has since been narrowly interpreted. *Taylor v. Farmers Ins. Co.*, 906 S.W.2d 882 (Mo.App.S.D. 1995). The procedural/substantive distinction was designed to restrict the ability of insurance companies to use their dual-interests (representing insureds in tort actions) to evade payment under their uninsured motorist policies. It is not a sweeping declaration of the impact of the Compulsory Counterclaim Rule.

Bianco's Argument Fails to Consider Policy and Practice Implications.

Bianco's Argument Transforms Compulsory Into Permissive Counterclaims.

Bianco fails to explain why compulsory no longer means compulsory. Its request to overturn so many cases from so many courts is a bold attempt to transform the Compulsory Counterclaim Rule into a permissive one. Compare Mo.R.Civ.P. 55.32(a) and (b). If a party must no longer "use-it-or lose-it," then what prevents it from filing compulsory counterclaims in a separate lawsuit at will? If the Rule no longer burdens parties to bring all claims in one lawsuit, then repeal the Rule (or, in this forum, overturn all the caselaw) and make all counterclaims permissive. That is what Bianco is, in effect, asking this Court to do.

Bianco Introduces a Subjective Analysis Into An Objective Rule.

Bianco's argument invites the problem that occurred here. Plaintiff will file one lawsuit; defendant (intentionally or inadvertently) will file a second. No matter how or when plaintiff complains of the second lawsuit, defendant will invariably raise some form of "waiver." Defendant may argue plaintiff consented to the second merely by filing a response. Bianco certainly advocates this in its analysis of *State ex rel Furstenfeld v. Nixon,* 133 S.W.340 (Mo. 1910). (Bianco Brief, p.64)

In the passage quoted by Bianco, *Furstenfeld* describes a classic case of how a party, by filing an answer, consents to a forum that lacked personal jurisdiction. (Bianco Brief, p.64) Bianco extrapolates that, "The Bank in the case at bar should be presumed to have consented to give the court jurisdiction over its person, that is its personal rights, by entering its appearance . . ." (Bianco Brief, p.65). There is not a scintilla of support for interpreting the Compulsory Counterclaim Rule in this manner. The Compulsory Counterclaim Rule has nothing to do with the court's power over the parties but over the subject matter they bring to that court. A subsequent court is "forever barred" from hearing those claims. *Harris v. Nola,* 537 S.W.2d 636, 639 (Mo.App.W.D. 1976)("forever barred"); *Becker Glove International, Inc. v. Jack Dubinski & Sons,* 41 S.W.3d 885, 886 (Mo. 2001) ("use-

it-or-lose-it"). Compulsory counterclaims must be raised in the first case. *Moss, supra.*

Raising delay or waiver later in the proceedings muddies the waters further. If defendant files a second lawsuit, and opposing party files a motion to dismiss or even an affirmative defense, then a defendant will again object. As Bianco did in this case, defendant will protest the other consented to the forum or its delay was unreasonable. (Bianco Brief, p.54,73) Aside from the fact that a party cannot consent to subject matter jurisdiction, when must a party raise this issue? See *State ex rel Lambert v. Flynn,* 154 S.W.2d 52, 57 (Mo. 1941) Bianco complains three months before trial was too late. (Bianco Brief, p.54)

Bianco's words jump off the page as it proclaims it "raised the issue of waiver of the affirmative defense at the first instance it was raised." (Bianco Brief, p.50). In August 1997 -- three months before trial -- Bianco filed an Amended Petition. (LF 3,36) That day, Meramec filed an Amended Answer and a Motion to Dismiss (both specifically citing the Compulsory Counterclaim Rule) to which Bianco also filed a Response complaining of delay and waiver. (LF 3,39,48,56) In its next breath, however, Bianco claims these were not enough.

Bianco's theory collapses under its own weight as Bianco attempts to have it both ways. First, it complained that Meramec needed to raise the issue as an

affirmative defense. (Bianco Brief, p.48-50) Although it was not required to, Meramec did raise it as an affirmative defense. (LF 3,39,48); *Rell, supra*.

Meramec's Right to Raise Issue at Trial.

Meramec further raised the issue in its Motion to Dismiss that Bianco complained should have been ruled on before trial. (LF 3,39,48,56; Bianco Brief, pp.14,48) Bianco ignores that its motion to file an Amended Petition prompted the Motion to Dismiss. (LF 3,36-83) That the Trial Court granted Bianco's motion for leave the first day of trial granted Meramec the absolute right to raise the counterclaim issue even during trial. (LF 38) Mo.R.Civ.P 55.27(a), 55.33(a). Knowing a jurisdiction-robbing motion was filed, Bianco risked a vanishing verdict by trying the case. *Moss, Rell*, supra. There was no waiver -- there was no delay.

Bianco suffered no prejudice in August 1999 when these pleadings were filed. The Trial Court continued the trial date until mid-November. The Replevin Case was on appeal, and Bianco's brief was due early November. Raising the compulsory counterclaim issue should have caused everyone in the case pause. However, despite the warnings in *Evergreen, Choate and Rell* (all decided before

trial)[8], Bianco opposed Meramec's Motion to Dismiss, filed its Replevin Case brief and tried the instant case days later.

In light of *Evergreen*, *Choate* and *Rell*, why would Bianco risk a "vanishing verdict"? Either it never occurred to Bianco, or it was a calculated risk. In the Replevin Case appeal, Bianco asserted its fraud claims were compulsory counterclaims (or, as stated by Bianco, the default in the Replevin Case should be set aside because Meramec did not alert Bianco (during the instant case) that Bianco should have pled the fraud claims in the Replevin Case). (Bianco Brief, p.80); *Meramec,* 14 S.W.3d at 688-689. For various reasons, the Eastern District set aside the default. *Id.*

This result assured that Bianco (at worst) could try the counterclaims where they belonged all along -- in the Replevin Case. However, if the Replevin Case was affirmed, the instant case would have been dismissed because (as pointed out in dicta or otherwise), they were compulsory counterclaims that should have been previously raised. *Id.* Thus, Bianco had nothing to lose by going to trial immediately. As Bianco has repeatedly pointed out, it did not request any of the four continuances. (Bianco Brief, p.47n.23) If Bianco lost, it could raise

[8] Bianco did not rely on *66, Inc.* It was handed down on August 3, 1999, the day after Bianco filed its Response to Meramec's Motion to Dismiss.

Evergreen, *Choate* and *Rell*. Meramec acknowledges that, under the Rule and the case law, the Compulsory Counterclaim Rule cuts both ways.

The final problem with Bianco's theory is that regardless of when the Bank raised the compulsory counterclaim issue, Bianco argues that Meramec's only recourse was to file a writ of prohibition to the Court of Appeals. (Bianco's Brief, p.71) Meramec does not dispute a writ of prohibition is appropriate; just not exclusive. A motion to dismiss, which can be appealed following judgment, is an appropriate means for raising whether a court has subject matter jurisdiction. See *State ex rel. McDonnell Douglas v. Ryan*, 745 S.W.2d 152, 153 (Mo. 1988).

What is interesting about Bianco's insistence on the writ, is the nature of the writ itself. A writ of prohibition is "[a] means of restraint on judicial personnel or bodies to prevent usurpation of judicial power, and its essential function is to confine inferior courts to their proper jurisdiction and to prevent them from acting without or in excess of their jurisdiction; it is preventive in nature rather than corrective." BLACK'S LAW DICTIONARY, Sixth Edition, p.1213, citing *State ex rel. McDonnell Douglas Corp. v. Gaertner*, 601 S.W.2d 295, 296 (Mo.App. 1980). A writ is not taken to challenge a party's personal rights and privileges; it is not taken on mere procedural matters; it is taken to challenge the jurisdiction of a court.

II.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S TWO (2) MOTIONS FOR DIRECTED VERDICT, MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL AND ENTERING JUDGMENT AGAINST MERAMEC FOR FRAUDULENT MISREPRESENTATION, BECAUSE UNDER MISSOURI LAW, BIANCO FAILED TO MAKE A SUBMISSIBLE CASE FOR THE JURY, IN THAT, THE WITNESSES' TESTIMONY AND DOCUMENTS OFFERED AT TRIAL FAILED TO DEMONSTRATE THAT MERAMEC'S ALLEGED REPRESENTATIONS ANYTHING MORE THAN A PROMISE.

For all the time Bianco spent firing aimlessly at the compulsory counterclaim issue, coming in under the radar is the fact that Bianco failed to state a claim for fraudulent misrepresentation against Meramec and failed to prove it at trial. This point is equal to, if not more important than, the jurisdictional issue. Regardless of which court was supposed to hear the claim, there was no legal basis for it. In other words, as intellectually intriguing as the jurisdictional issue might be, there were no facts to support Bianco's claim of fraud under Missouri law.

The elements of fraud are demanding for good reason -- parties cannot shift the blame for unpaid debts and cannot charge fraud for failed contracts. Bianco

dealt with Meramec and the manufacturers for years entering into standard financing arrangements with each. Filing lawsuits and seizing assets are remedies of last resort that seldom yield total recovery for creditors. But it is sometimes necessary.

Although Meramec was among the last to file a replevin action against Bianco (the Replevin Case),[9] it was the first to collect assets. That is not fraud. A party should not fear a fraud attack every time it enters into an arms-length transaction or the threat of punitive damages and attorneys' fees every time a financing deal sours. Transaction costs escalate, lawsuits proliferate, and because fraud claims seldom prevail in the end, everyone generally loses. Fraudulent misrepresentation has become an alternative pleading in most commercial cases. This case is an example.

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[9] *Bombardier Capital, Inc. v. Joel Bianco Kawasaki Plus, Inc.*, Case No. 97CC-3166-77CV (St. Louis Co., MO)(replevin filed September 24, 1997; Order of Delivery issued same day; judgment entered against Bianco for $232,000.00) (Tr.Vol.I p.14-15, p.63,ln1-2; Tr.Ex. 108) *Polaris Acceptance Inc. v. Joel Bianco Kawasaki Plus,* Case No. 97CC-3189-1 (St. Louis Co., MO)(replevin filed September 25, 1997. (Tr.Vol.III p.347,ln.23-25; p.348,ln.1-7). Kawasaki Motors Finance made demand Bianco. (Tr.Vol.I p.13-14; Tr. 145-146; Tr.Vol.III, p.436,ln.3-12; p.522,ln.2-22; Tr.Vol.V p.572,ln.22-25; pp.624-625; Tr.Ex.108).

Bianco describes Trial Exhibit 36 as a "standstill agreement." (Bianco Brief, p.26). Bianco argues it was not "complete" or "integrated," but never suggests it was anything but a valid contract. (Bianco Brief, p.85). Whether the standstill agreement was complete or integrated goes to the evidentiary issue of allowing parole evidence to interpret it. See *Kassebaum v. Kassebaum*, 42 S.W.2d 685 (Mo.App.E.D. 2001). Bianco refers to Trial Exhibit 36 throughout its misrepresentation argument and attempts to interpret it through the testimony of witnesses on both sides. If it was not an integrated contract, then it was perfectly proper to do so. However, Bianco's position only bolsters the fact that there was an agreement between the parties thereby diminishing the existence of an independent tort for misrepresentation. See *Stewart v. Kirkland*, 929 S.W.2d 321, 323 (Mo.App.S.D. 1996); *Thoroughbred Ford, Inc. v. Ford Motor Company*, 908 S.W.2d 719, 732 (Mo.App.E.D. 1995); *Titan Construction v. Mark Twain Bank*, 887 S.W.2d 454, 459 (Mo.App W.D. 1994).

Unless a promise is accompanied by a "present intent not to perform," a misrepresentation is not actionable. *Stewart*, 929 S.W.2d at 323. Missouri courts have held that the breach alone (even if it occurs the next day) does not demonstrate this intent. *Id.* Bianco summarily dismisses these cases instead stating in conclusory fashion that there was "ample evidence to demonstrate a

present intent not to perform." (Bianco Brief, p.89). However, other than Meramec's alleged failure to perform, Bianco points to none.

As for the materiality of the alleged misrepresentations, Bianco does not dispute that it cannot claim fraud for something it was already obligated to do. Bianco denies that it was obligated to do anything even under a security agreement with Meramec. (Bianco Brief, pp.97-98). Bianco explains that while the security agreement (Trial Exhibit 89) "says that the Bank may demand additional security, it does not obligate the borrower to provide it." (Bianco Brief, p.97). With its signature at the bottom of the security agreement, that is precisely what Bianco is obligated to do. Bianco further claims Meramec "was not giving up any remedy, which was a condition to demanding additional security." (Bianco Brief, p.97). In other words, according to Bianco, there was a condition precedent to a demand that does not have to be met! Meramec and Bianco entered into a "standstill agreement" whereby Meramec gave up its rights under the Order of Delivery issued by the Court in the Replevin Case to take immediate possession of Bianco's goods. Meramec could not have fraudulently induced Bianco to do something it was already obligated to do under a security agreement.

Acknowledging Bianco's interpretation of the security agreement for a moment (that Meramec did not give up a remedy because "it did not have the right to seize the goods") Bianco mistakenly believes that holding a purchase money

security interest ("PMSI") magically strips a junior lienholder of all its rights to the collateral. (Bianco Brief, pp.97-98). Article 9 does not work that way and, with all due respect, the testimony of Della Moon and Nauni Jo Manty (neither of whom are Missouri lawyers) on this point is irrelevant. (Bianco Brief, p.97).

The security agreements provide that Bianco granted Meramec a security interest in certain collateral. (Tr.Ex. 85, 86, 88, 89); see §§ 400.9-203 (attachment), 400.9-302 RSMo (perfection). Bianco does not dispute Meramec's collateral included personal watercraft in which the manufactures held a PMSI. However, although the holder of a PMSI may prime a junior lienholder in a priority dispute, the junior still possesses rights in the collateral, including but not limited to, the right to replevin. §§ 400.9-201, 400.9-312(3) RSMo. Under Missouri law, it is irrelevant who replevies the collateral. The security interests granted remain and the proceeds flow according to priority. See §§ 400.9-306, § 400.9-312(3) RSMo.

III.

THE TRIAL COURT ERRED IN OVERRULING MERAMEC'S OBJECTIONS TO BIANCOS' JURY INSTRUCTIONS, DENYING JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL AND ALLOWING JUDGMENT TO BE ENTERED AGAINST MERAMEC ON THE CLAIM OF FRAUDULENT MISREPRESENTATION, BECAUSE BIANCOS' VERDICT DIRECTOR IN INSTRUCTION NO. 7 WAS PLAINLY ERRONEOUS UNDER MISSOURI LAW, IN THAT, IT IS PRESUMED TO BE PREJUDICIAL WHERE FAILED TO COMPLY WITH MAI AND WAS PATENTLY CONFUSING.

Bianco does not dispute that Instruction No. 7 (set forth in its entirety in Meramec's Substitute Brief, p.125-126) deviates from MAI, in that, the instruction completely omitted the parenthetical language required under MAI 23.05 describing the materiality of the alleged misrepresentations. (Bianco Brief, p.109). MAI is explicit. Bianco's defense that the materiality becomes apparent if you read the entire instruction or sat through four days of trial is not a recognized exception to MAI. (Bianco Brief, p.109). What was left was a conclusory allegation insufficient to allow the jury to make any meaningful determination. Bianco states in its Brief that the "misrepresentations were material to [Bianco] in providing

additional collateral." (Bianco Brief, p. 109). If so, then Bianco was obligated to include such language in the instruction; it was not optional. When there is a deviation from MAI, prejudicial error will be presumed. *Jenkins v. Keller,* 579 S.W.2d 166, 167 (Mo.App.S.D. 1979).

Bianco's omission went to the heart of its claim. Materiality was an essential element to Bianco's the claim of fraudulent misrepresentation. See *Dobbins v. Kramer,* 780 S.W.2d 717, 719 (Mo.App.W.D. 1989) (reversed where instruction failed to include element of intent). As previously set forth in Meramec's Opening Brief and again hereinabove, Bianco failed to set forth sufficient evidence of materiality at trial thereby compounding the error in the instruction. Missouri law is clear that misrepresentations inducing a party to do something it was already obligated to do are not material and, thus, not actionable as fraud. See *Hueseman v. Medicine Shoppe International, Inc,* 844 S.W.2d 128 (Mo.App.E.D. 1993). Instruction No. 7 was plainly erroneous.

CONCLUSION

Based on the foregoing, Meramec respectfully requests this Honorable Court to AFFIRM the opinion of the Court of Appeals vacating the judgment of the Trial Court for lack of subject matter jurisdiction or, in the alternative, REVERSE and REMAND the cause to the Trial Court for a new trial or with instructions to proceed to a just adjudication on the merits, and for such further relief as the Court deems just and proper.

Respectfully submitted,

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By:_____

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CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing and one copy of the disk were hand delivered to counsel for Respondents, Thomas Blumenthal, Paule, Camazine & Blumenthal, P.C., 165 N. Meramec Avenue, 6th Floor, St. Louis, Missouri 63105 and counsel for Intervenor, William Daniel, Daniel Law Offices, P.C., 1116 Culverhill Drive, St. Louis, Missouri 63119-4938, on the 28th day of February, 2002.

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IN THE SUPREME COURT OF MISSOURI
EN BANC

JOEL C. BIANCO, *et al.*,	)	
	)	
Respondents	)	
	)	
v.	)	Supreme Court No. SC 84046
	)	
MERAMEC VALLEY BANK,	)	
	)	
Appellant.	)	

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

COMES NOW Michael A. Campbell, attorney for Appellant Meramec Valley Bank ("Appellant"), and pursuant to Rule 84.06(c) states as follows:

1. Appellant's Reply Brief includes the information required by Rule 55.03.

2. Appellant's Reply Brief complies with the limitations contained in Rule 84.06(b) and Special Rule 1.

3. The number of words in Appellant's Reply Brief excluding the cover, signature block, certificate of service, statutory appendix and this certificate is 7738.

4. A floppy disk containing Appellant's Reply Brief is attached hereto. Counsel certifies that said disk has been scanned for viruses and is virus free.

Respectfully submitted,

CAMPBELL & COYNE, P.C.

_____

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STATUTORY APPENDIX

MISSOURI REVISED STATUTES

GENERAL VALIDITY OF SECURITY AGREEMENT.

400.9-201. Except as otherwise provided by this chapter a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors. Nothing in this article validates any charge or practice illegal under any statute or regulation thereunder governing usury, small loans, retail installment sales, or the like, or extends the application of any such statute or regulation to any transaction not otherwise subject thereto.

ATTACHMENT AND ENFORCEABILITY OF SECURITY INTEREST--PROCEEDS--FORMAL REQUISITES.

400.9-203. (1) Subject to the provisions of section 400.4-208 on the security interest of a collecting bank, sections 400.9-115 and 400.9- 116 on security interests in investment property, and section 400.9-113 on a security interest arising under the article on sales, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:

(a) the collateral is in the possession of the secured party pursuant to agreement, the collateral is investment property and the secured party has control pursuant to

agreement, or the debtor has signed a security agreement which contains a description of the collateral and in addition, when the security interest covers timber to be cut, a description of the land concerned;

(b) value has been given; and

(c) the debtor has rights in the collateral.

(2) A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified in subsection (1) have taken place unless explicit agreement postpones the time of attaching.

(3) Unless otherwise agreed a security agreement gives the secured party the rights to proceeds provided by section 400.9-306.

(4) A transaction, although subject to this article, is also subject to sections 365.010 to 365.160, RSMo, and sections 408.100 to 408.562, RSMo, and in the case of conflict between the provisions of this article and any such statute, the provisions of such statute control. Failure to comply with any applicable statute has only the effect which is specified therein.

WHEN FILING IS REQUIRED TO PERFECT SECURITY INTEREST.

400.9-302. (1) A financing statement must be filed to perfect all security interests except the following:

(a) a security interest in collateral in possession of the secured party under section 400.9-305;

(b) a security interest temporarily perfected in instruments, certificated securities, or documents without delivery under section 400.9-304 or in proceeds for a ten-day period under section 400.9-306;

(c) a security interest created by an assignment of a beneficial interest in a trust or a decedent's estate;

(d) a purchase money security interest in consumer goods; but filing is required for a motor vehicle required to be registered; and fixture filing is required for priority over conflicting interests in fixtures to the extent provided in section 400.9-313;

(e) an assignment of accounts which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts of the assignor;

(f) a security interest of a collecting bank (section 400.4-208) or in securities (section 400.8-321) or arising under the article on sales (see section 400.9-113) or covered in subsection (3) of this section;

(g) an assignment for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder;

(h) a security interest in investment property which is perfected without filing under section 400.9-115 or section 400.9-116.

(2) If a secured party assigns a perfected security interest, no filing under this article is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

(3) The filing of a financing statement otherwise required by this article is not necessary or effective to perfect a security interest in property subject to

(a) a statute or treaty of the United States which provides for a national or international registration or a national or international certificate of title or which specifies a place of filing different from that specified in this article for filing of the security interests; or

(b) section 301.190, RSMo, or section 306.400, RSMo; but during any period in which collateral is inventory held for sale by a person who is in the business of selling goods of that kind, the filing provisions of this article (part 4) apply to a security interest in that collateral created by him as debtor; or

(c) a certificate of title statute of another jurisdiction under the law of which indication of a security interest on the certificate is required as a condition of perfection (subsection (2) of section 400.9-103).

(4) Compliance with a statute or treaty described in subsection (3) is equivalent to the filing of a financing statement under this article, and a security interest in property subject to the statute or treaty can be perfected only by compliance therewith, except as provided in section 400.9-103 on multiple state transactions.

Duration and renewal of perfection of a security interest perfected by compliance with the statute or treaty or governed by the provisions of the statute or treaty; in other respects the security interest is subject to this article.

"PROCEEDS"--SECURED PARTY'S RIGHTS ON DISPOSITION OF COLLATERAL.

400.9-306. (1) "Proceeds" includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement. Any payments or distributions made with respect to investment property collateral are proceeds. Money, checks, deposit accounts and the like are "cash proceeds". All other proceeds are "non-cash proceeds".

(2) Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise provided the creditor agrees in writing, and also continues in any identifiable proceeds including collections received by the debtor.

(3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be a perfected

security interest and becomes unperfected ten days after receipt of the proceeds by the debtor unless

(a) a filed financing statement covers the original collateral and the proceeds are collateral in which a security interest may be perfected by filing in the office or offices where the financing statement has been filed and, if the proceeds are acquired with cash proceeds, the description of collateral in the financing statement indicates the types of property constituting the proceeds;

(b) a filed financing statement covers the original collateral and the proceeds are identifiable cash proceeds;

(c) the original collateral was investment property and the proceeds are identifiable cash proceeds; or

(d) the security interest in the proceeds is perfected before the expiration of the ten-day period. Except as provided in this section, a security interest in proceeds can be perfected only by the methods or under the circumstances permitted in this article for original collateral of the same type.

(4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest only in the following proceeds:

(a) in identifiable non-cash proceeds and in separate deposit accounts containing only proceeds;

(b) in identifiable cash proceeds in the form of money which is neither commingled with other money nor deposited in a deposit account prior to the insolvency proceedings;

(c) in identifiable cash proceeds in the form of checks and the like which are not deposited in a deposit account prior to the insolvency proceedings; and

(d) in all cash and deposit accounts of the debtor in which proceeds have been commingled with other funds, but the perfected security interest under this paragraph (d) is

(i) subject to any right of setoff; and

(ii) limited to an amount not greater than the amount of any cash proceeds received by the debtor within ten days before the institution of the insolvency proceedings less the sum of (I) the payments to the secured party on account of cash proceeds received by the debtor during such period and (II) the cash proceeds received by the debtor during such period to which the secured party is entitled under paragraphs (a) through (c) of this subsection (4).

(5) If a sale of goods results in an account or chattel paper which is transferred by the seller to a secured party, and if the goods are returned to or are repossessed by the seller or the secured party, the following rules determine priorities:

(a) If the goods were collateral at the time of sale, for an indebtedness of the seller which is still unpaid, the original security interest attaches again to the goods and

continues as a perfected security interest if it was perfected at the time when the goods were sold. If the security interest was originally perfected by a filing which is still effective, nothing further is required to continue the perfected status; in any other case, the secured party must take possession of the returned or repossessed goods or must file.

(b) An unpaid transferee of the chattel paper has a security interest in the goods against the transferor. Such security interest is prior to a security interest asserted under paragraph (a) to the extent that the transferee of the chattel paper was entitled to priority under section 400.9-308.

(c) An unpaid transferee of the account has a security interest in the goods against the transferor. Such security interest is subordinate to a security interest asserted under paragraph (a).

(d) A security interest of an unpaid transferee asserted under paragraph (b) or (c) must be perfected for protection against creditors of the transferor and purchasers of the returned or repossessed goods.

PRIORITIES AMONG CONFLICTING SECURITY INTERESTS IN THE SAME COLLATERAL.

400.9-312. (1) The rules of priority stated in other sections of this part and in the following sections shall govern when applicable: section 400.4-210, with respect to

the security interests of collecting banks in items being collected, accompanying documents and proceeds; section 400.9-103 on security interests related to other jurisdictions; section 400.9-114 on consignments; section 400.9-115 on security interests in investment property.

(2) A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.

(3) A perfected purchase money security interest in inventory has priority over a conflicting security interest in the same inventory and also has priority in identifiable cash proceeds received on or before the delivery of the inventory to a buyer if

(a) the purchase money security interest is perfected at the time the debtor receives possession of the inventory; and

(b) the purchase money secured party gives notification in writing to the holder of the conflicting security interest if the holder had filed a financing statement covering the same types of inventory (i) before the date of the filing made by the

purchase money secured party, or (ii) before the beginning of the twenty-one-day period where the purchase money security interest is temporarily perfected without filing or possession (subsection (5) of section 400.9-304); and

(c) the holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory; and

(d) the notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing such inventory by item or type.

(4) A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within twenty days thereafter.

(5) In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section), priority between conflicting security interests in the same collateral shall be determined according to the following rules:

(a) Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral

or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.

(b) So long as conflicting security interests are unperfected, the first to attach has priority.

(6) For the purposes of subsection (5) a date of filing or perfection as to collateral is also a date of filing or perfection as to proceeds.

(7) If future advances are made while a security interest is perfected by filing, the taking of possession, or under section 400.9-115 or section 400.9-116 on investment property, the security interest has the same priority for the purposes of subsection (5) or section 400.9-115(5) with respect to the future advances as it does with respect to the first advance. If a commitment is made before or while the security interest is so perfected, the security interest has the same priority with respect to advances made pursuant thereto. In other cases a perfected security interest has priority from the date the advance is made.

WHAT A PLEADING SHALL STATE AS A COUNTERCLAIM.

509.420. A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrences that is the subject

matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

MISSOURI RULES OF CIVIL PROCEDURE

RULE 55.08 AFFIRMATIVE DEFENSES

In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances, including but not limited to accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, comparative fault, state of the art as provided by statute, seller in the stream of commerce as provided by statute, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in defamation, waiver, and any other matter constituting an avoidance or affirmative defense. A pleading that sets forth an affirmative defense or avoidance shall contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court may treat the pleadings as if there had been a proper designation.

RULE 55.27 DEFENSES AND OBJECTIONS HOW PRESENTED BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

(a) How Presented. Every defense, in law or fact, to a claim in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter,

(2) lack of jurisdiction over the person,

(3) improper venue,

(4) insufficiency of process,

(5) insufficiency of service of process,

(6) failure to state a claim upon which relief can be granted,

(7) failure to join a party under Rule 52.04,

(8) that plaintiff should furnish security for costs,

(9) that plaintiff does not have legal capacity to sue,

(10) that there is another action pending between the same parties for the same cause in this state,

(11) that several claims have been improperly united,

(12) that the counterclaim or cross-claim is one which cannot be properly interposed in this action.

A motion making any of these defenses shall be made within the time allowed for responding to the opposing party's pleading, or, if no responsive pleading is permitted, within thirty days after the service of the last pleading. Motions and pleadings may be filed simultaneously without waiver of the matters contained in either. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to the claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 74.04, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 74.04.

(b) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the

pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 74.04, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 74.04.

(c) Preliminary Hearings. The defenses specifically enumerated (1)-(12) in subdivision (a) of this Rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (b) of this Rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(d) Motion for More Definite Statement. A party may move for a more definite statement of any matter contained in a pleading that is not averred with sufficient definiteness or particularity to enable the party properly to prepare responsive pleadings or to prepare generally for trial when a responsive pleading is not required. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order, or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(e) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within thirty days after the service of the pleading upon any party or upon the

court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(f) Consolidation of Defenses in Motion. A party who makes a motion under this Rule 55.27 may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this Rule 55.27 but omits therefrom any defense or objection then available that this Rule 55.27 permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in Rule 55.27(g)(2) on any of the grounds there stated.

(g) Waiver or Preservation of Certain Defenses. (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, that plaintiff should furnish security for costs, that plaintiff does not have legal capacity to sue, that there is another action pending between the same parties for the same cause in this state, that several claims have been improperly united or that the counterclaim or cross-claim is one which cannot be properly interposed in this action is waived (A) if omitted from a motion in the circumstances described in subdivision (f) or (B) if it is neither made by motion under this Rule nor included in a responsive pleading. (2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join

a party indispensable under Rule 52.04, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 55.01, or by motion for judgment on the pleadings, or at the trial on the merits, or on appeal. (3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

RULE 55.32 (a) and (b) COUNTERCLAIM AND CROSS-CLAIM

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim that at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if: (1) at the time the action was commenced the claim was the subject of another pending action or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 55.32.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

RULE 55.33(a) AMENDED AND SUPPLEMENTAL PLEADINGS

Amendments. A pleading may be amended once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the pleading may be amended at any time within thirty days after it is served. Otherwise, the pleading may be amended only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

RULE 84.13 ALLEGATIONS OF ERROR CONSIDERED REVERSIBLE ERROR

(a) Preservation of Error in Civil Cases. Apart from questions of jurisdiction of the trial court over the subject matter and questions as to the sufficiency of pleadings to state a claim upon which relief can be granted or a legal defense to a claim, allegations of error not briefed or not properly briefed shall not be considered in

any civil appeal and allegations of error not presented to or expressly decided by the trial court shall not be considered in any civil appeal from a jury tried case.

(b) Materiality of Error. No appellate court shall reverse any judgment unless it finds that error was committed by the trial court against the appellant materially affecting the merits of the action.

(c) Plain Error May Be Considered. Plain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.

(d) Appellate review in cases tried without a jury or with an advisory jury.

(1) The court shall review the case upon both the law and the evidence as in suits of an equitable nature;

(2) The court shall give due regard to the opportunity of the trial court to have judged the credibility of witnesses;

(3) The court shall consider admissible evidence that was rejected by the trial court and preserved. The court may order that proffered evidence that was rejected by the trial court and not preserved be taken by deposition or by reference to a master under Rule 68.03 and returned to the appellate court.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 13.01 COMPULSORY COUNTERCLAIMS

A pleading shall state as a counterclaim any claim, other than a tort claim, which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that a claim need not be stated as a counterclaim if at the time the action was commenced the claim was the subject of another pending action. This rule shall not be construed as requiring a counterclaim to be filed in any court whose jurisdiction is limited either as to subject matter or as to monetary amount so as to be unable to entertain such counterclaim.

MISSOURI APPROVED INSTRUCTIONS

MAI 23.05 [1996 Revision] Verdict Directing – Fraudulent Misrepresentations

Your verdict must be for plaintiff if you believe:

First, defendant *(describe act such as "represented to plaintiff that the motor vehicle was new")*, intending that plaintiff rely upon such representation in *(purchasing the motor vehicle)*, and

Second, the representation was false, and

Third, [defendant knew that it was false] [defendant knew that it was false at the time the representation was made] [defendant did not know whether the representation was true or false], and

Fourth, the representation was material to the *(purchase by plaintiff of the motor vehicle)*, and

Fifth, plaintiff relied on the representation in *(making the purchase)*, and [in so relying used that degree of care that would have been reasonable in plaintiff's situation, and]

Sixth, as a direct result of such representation the plaintiff was damaged.

*[unless you believe plaintiff is not entitled to recover by reason of Instruction Number ___ *(here insert number of affirmative defense instruction)*].